

# COMMENTS

## RENT CONTROL: A PRACTICAL GUIDE FOR TENANT ORGANIZATIONS

*Large, repeated rent increases present a serious problem to many tenants. Rent control, a legislative response to this problem, attempts to protect tenants by regulating such increases. Because rent control legislation must satisfy due process standards, careful draftsmanship is essential to its validity. This Comment analyzes various types of rent control measures and examines the reasons courts have upheld or have invalidated specific provisions of such legislation. It can serve as a guide to tenant organizations and to others interested in designing rent control measures capable of withstanding constitutional attack.*

State and local rent controls first appeared immediately after World War I to meet the housing crisis resulting from the termination of voluntary controls.<sup>1</sup> The states and cities adopting rent controls considered them temporary emergency measures that would be unconstitutional in other circumstances. During World War II, Congress provided for rent control on a national basis which in some areas continued until 1954.<sup>2</sup>

In recent years, the primary leaders of the tenant organization movement have been middle class citizens who were forced into tenant status with an accompanying loss of bargaining power.<sup>3</sup> In

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1. Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 URB. LAW. 447, 456 (1975).

2. Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenant's Movement*, 28 HASTINGS L.J. 631, 634 (1977) [hereinafter cited as *Rent Control in the 1970's*]. For a history of rent control up to World War II, see Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54 (1950); Comment, *Residential Rent Control in New York City*, 3 COLUM. J.L. & SOC. PROB. 30 (1967).

3. *Rent Control in the 1970's*, *supra* note 2, at 634. *Rent Control in the 1970's* describes the history, organization, and strategies of the New Jersey Tenant's Organ-

1969, these leaders began organizing to exert pressure for rent controls.<sup>4</sup> However, some initial efforts failed; local rent control ordinances were held invalid in Florida and in Massachusetts on the ground that cities in these states lacked home rule power to adopt rent control.<sup>5</sup> Both states subsequently enacted enabling legislation giving municipalities the power to pass rent control ordinances.<sup>6</sup> Also, Connecticut passed a local option law allowing municipalities to establish fair rent commissions with power to control and eliminate excessive rental charges.<sup>7</sup>

Federal rent control began in 1971 pursuant to the Economic Stabilization Act of 1970.<sup>8</sup> August 15, 1971, marked the beginning of Phase I, a ninety-day freeze on all wages, prices, and rents.<sup>9</sup> Phase II involved an economic stabilization program and permitted landlords to increase rents by a limited amount each year.<sup>10</sup> During Phase II, landlords could obtain additional rent increases under certain circumstances.<sup>11</sup> On January 12, 1973, Phase II controls ended, and Phase III, calling for voluntary restraint, began.<sup>12</sup>

The termination of Phase II controls prompted passage of significant state and local rent control measures. The peacetime regulation of rents, labeled "Second Generation Rent Control," has since been found in communities with increasing inflation and low vacancy rates. Rent controls are an attempt to compensate for

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ization. More than 110 New Jersey municipalities have adopted rent control within the past five years. *Id.*, at 631.

4. *Id.*, at 634-36. New York City is unique because with the exception of the period between 1929 and 1942, it has had continuous controls since 1921. For discussions of rent control in New York City, see Comment, *The ABC's of MBR: How to Spell Trouble in Landlord/Tenant Relations (Up Against the Crumbling Walls)*, 10 COLUM. J.L. & SOC. PROB. 113 (1974); Comment, *Residential Rent Control in New York City*, 3 COLUM. J.L. & SOC. PROB. 30 (1967).

5. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972); *Marshall House, Inc. v. Rent Review & Grievance Bd.*, 357 Mass. 709, 260 N.E.2d 200 (1970).

6. Act of June 7, 1973, ch. 73-129, 1973 Fla. Laws 238 (codified at FLA. STAT. ANN. § 166.021 (West 1973)); Act of Aug. 31, 1970, ch. 842, §§ 1-14 (codified at MASS. GEN. LAWS ANN. ch. 40 app., §§ 1-1 to -14 (West Supp. 1977)) (expired 1976). Massachusetts adopted enabling legislation for two of the four cities that adopted rent control ordinances prior to the expiration of the option law. Special enabling acts for the other two cities were still in effect. *Rent Control in the 1970's*, *supra* note 2, at 638.

7. Pub. Act 274, 1969 Conn. Pub. Acts 294 (amended 1971 & 1972) (codified at CONN. GEN. STAT. ANN. § 7-148b (West 1972)).

8. Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970) (codified at 12 U.S.C. § 1904 note (1976)) (expired 1974).

9. Exec. Order No. 11,615, 3 C.F.R. 602 (1971-1975 Compilation).

10. Exec. Order No. 11,627, 3 C.F.R. 621 (1971-1975 Compilation).

11. *Rent Control in the 1970's*, *supra* note 2, at 639-40. Landlords were allowed rent increases on the basis of state and local property tax increases, increases due to capital improvements, base rent increases upon lease renewals, and hardship increases.

12. Exec. Order No. 11,695, 3 C.F.R. 741 (1971-1975 Compilation).

tenants' lack of bargaining power with regard to rents and housing conditions in these communities.<sup>13</sup>

Today, several methods of enacting rent control legislation exist. A state may pass a rent control statute which covers every residential unit within that state,<sup>14</sup> or it may adopt enabling legislation specifically empowering municipalities to enact rent control measures without risking state preemption.<sup>15</sup> A city or county may enact rent control by local ordinance pursuant to its home rule or local police powers.<sup>16</sup> Finally, voters may use the initiative process to enact rent control at the state or local level.<sup>17</sup>

#### SUMMARY OF ARGUMENTS FOR AND AGAINST RENT CONTROL<sup>18</sup>

Opponents of rent control argue that the reduced expected returns accompanying rent control produce many adverse effects. For example, opponents assert that rent control discourages investment in housing. They maintain that rent controls prolong housing shortages because lenders are reluctant to lend money

13. Blumberg, Robbins, & Baar, *The Emergence of Second Generation Rent Controls*, 8 CLEARINGHOUSE REV. 240, 240 (1974) [hereinafter cited as *Second Generation Rent Controls*]. Tenants' bargaining power is greatly impaired when vacancy rates fall below five percent for the overall market and three percent for low- and moderate-income housing. See *id.* at 240 n.4.

14. *Id.* at 241-42. Statewide controls may be weaker than municipal controls; they may also be more rigid. The governing body of a municipality may amend a local law easily and frequently in response to changing local conditions. However, it is doubtful that a state legislature would respond as quickly to the needs of a single city or county. "[A] key committee member, possibly one who had few tenants in his district, could bottle up a critical piece of legislation." *Rent Control in the 1970's*, *supra* note 2, at 682.

15. *E.g.*, ME. REV. STAT. ANN. tit. 30, § 5372 (West Supp. 1973).

16. *Second Generation Rent Controls*, *supra* note 13, at 241. Municipal controls can have certain drawbacks. If rent control is achieved strictly by municipal control, no two municipalities will have the same rent-leveling scheme. Also, local ordinances are subject to frequent changes. This characteristic creates uncertainty in the market by making it impossible for potential investors to predict future returns. Thus, rent regulation by local ordinance may discourage investment. *Rent Control in the 1970's*, *supra* note 2, at 681. Proponents of rent control should weigh the benefits and drawbacks of both municipal and statewide controls before settling upon a course of action.

17. See, *e.g.*, *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976). The primary use of the initiative has been at the local level. *Second Generation Rent Controls*, *supra* note 13, at 241 n.22.

18. A detailed discussion of the complex economic arguments regarding the desirability and the effectiveness of rent control is beyond the scope of this Comment. This section summarizes selected arguments from both sides.

for the construction of rental housing in controlled areas.<sup>19</sup> In addition, landlords of controlled units may not receive income sufficient to cover both cost and profit requirements. Landlords may therefore defer normal maintenance services or attempt to exact additional payments for items usually included in the price of apartment rental.<sup>20</sup>

Proponents of rent control argue that during housing shortages, as demonstrated by low vacancy rates, tenants in effect lose their freedom of choice.<sup>21</sup> In such circumstances, tenants who must decide whether to pay exorbitant rents or to move actually have no choice but to pay the higher rents. Proponents of rent control argue that the housing supply is slow to respond to increased demand, thus creating a situation "ripe for exploitation."<sup>22</sup> They maintain that landlords exploit housing shortages by raising rent levels to a disproportionate extent compared with housing cost increases. Rent control proponents claim that controls curb excess rents and restore rents to a level which is fair to both landlords and tenants.<sup>23</sup>

#### GENERAL CONSTITUTIONAL RESTRICTIONS ON RENT CONTROL LEGISLATION

##### *Due Process—Public Emergency Versus Rational Relation Requirements*

Rent control statutes and ordinances usually contain "boilerplate" declarations of a housing emergency.<sup>24</sup> Until recent years, almost all courts have viewed the declaration of an emergency as a prerequisite to the legislation's constitutionality.<sup>25</sup> Modernly, several courts have rejected the housing emergency doctrine and have upheld rent control measures even in the absence of a proven emergency.<sup>26</sup>

The concept of a housing emergency "requirement" stems from the concept of economic due process, which subjected matters of

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19. C. ASHMUN & R. FRANKEN, *RENT CONTROL: AN INTERIM REPORT TO THE ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT* 28 (1975).

20. *Id.* at 28-29, 31.

21. *Id.* at 31.

22. *Id.* at 32.

23. *Id.*

24. Baar & Keating, *The Last Stand of Economic Substantive Due Process—The Housing Emergency Requirement for Rent Control*, 7 URB. LAW. 447, 449 (1975).

25. For a thorough discussion of the housing emergency requirement and a vigorous argument for its elimination, see *id.*

26. *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976); *Westchester W. No. 2 Ltd. v. Montgomery County*, 276 Md. 48, 348 A.2d 856 (1975); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975).

economic regulation to judicial intervention.<sup>27</sup> The United States Supreme Court first applied this concept when in light of the emergency conditions created by World War I, it upheld rent control laws in *Block v. Hirsh*<sup>28</sup> and *Marcus Brown Holding Co. v. Feldman*.<sup>29</sup> The Court explained in *Block* that "[t]he regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."<sup>30</sup> Three years later, in *Chastleton Corp. v. Sinclair*,<sup>31</sup> the Court made clear that it would not tolerate extension of these World War I rent controls beyond the emergency period. Applying a narrow standard of emergency, the Court stated: "If about all that remains of war conditions is the increased cost of living, that is not in itself a justification of the act."<sup>32</sup> Since its decision in *Chastleton*, the Supreme Court has not considered specifically the extent to which state or municipal legislative bodies may constitutionally impose rent controls.

The Supreme Court's views in the related fields of price and wage controls have changed substantially since the Court decided *Chastleton* in 1924. During the early 1920's a majority of the Supreme Court viewed the liberty protected by the fifth and fourteenth amendment due process clauses as including a freedom of contract.<sup>33</sup> The due process clauses thus normally precluded legislative bodies from regulating prices or wages in businesses not "affected with a public interest."<sup>34</sup> The Supreme Court repudiated

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27. *Second Generation Rent Controls*, *supra* note 13, at 242.

28. 256 U.S. 135 (1921).

29. 256 U.S. 170 (1921).

30. 256 U.S. at 157.

31. 264 U.S. 543 (1924).

32. *Id.* at 548. The Court reversed, stating that the court below should ascertain and weigh the facts to determine whether the emergency justifying the statute still existed. *Id.* at 549.

33. See *Coppage v. Kansas*, 236 U.S. 1 (1915).

34. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927). The Supreme Court suggested three classes of businesses "affected with a public interest":

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws . . . regulating all trades and callings. Such are those of the keepers of inns, cabs, and grist mills . . . .

(3) Businesses which though not public at their inception may be

this restrictive view of the police power during the 1930's, beginning with *Nebbia v. New York*.<sup>35</sup> Since its decision in *Nebbia*, the Court generally has upheld price control legislation regardless of whether an emergency existed or whether the business was one affected with a public interest.<sup>36</sup> The Court requires only that a law be reasonably related to a proper legislative purpose and be neither arbitrary nor discriminatory.<sup>37</sup>

Yet most rent control measures routinely continue to include a declaration of housing emergency, for courts of several jurisdictions continue to treat the existence of an emergency as essential to the constitutionality of rent control. These courts distinguish housing from wage and price control as one of the "necessities of life," the price of which may not routinely be regulated as a normal legislative policy.<sup>38</sup> Many of these courts purport to require an emergency but defer to a legislative declaration of emergency in the rent control statute. The declaration coupled with the absence of any affirmative proof that the declaration is untrue satisfies the emergency requirement.<sup>39</sup> Other courts, however, seize upon the lack of a sufficiently serious emergency as a reason for invalidating rent control legislation.<sup>40</sup> These opinions do not discuss the emergency requirement in light of the United States Supreme Court's change of approach to the constitutionality of price controls.

Still other courts have concluded that the fundamental change in the Supreme Court's approach renders the emergency requirement obsolete. In *Eisen v. Eastman*,<sup>41</sup> Judge Friendly stated for the majority:

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fairly said to have risen to be such, and have become subject in consequence to some government regulation. . . . [T]he owner by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest  
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*Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923).

35. 291 U.S. 502 (1934). The Court declared:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose . . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . .

*Id.* at 537.

36. *Olsen v. Nebraska*, 313 U.S. 236 (1941).

37. *Nebbia v. New York*, 291 U.S. at 537.

38. See *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 804-05 (Fla. 1972); *Warren v. City of Philadelphia*, 387 Pa. 362, 365-66, 127 A.2d 703, 705 (1956).

39. See, e.g., *Russell v. Treasurer*, 331 Mass. 501, 120 N.E.2d 388 (1954).

40. See, e.g., *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972); *Warren v. City of Philadelphia*, 387 Pa. 362, 127 A.2d 703 (1956).

41. 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[W]e have no doubt that [the United States Supreme Court] would sustain the validity of rent control today. . . . The time when extraordinarily exigent circumstances were required to justify price control outside the traditional public utility areas passed on the day that *Nebbia v. New York* . . . was decided. Whether, as some believe, rent control does not prolong the very condition that gave it birth is a policy issue not appropriate for judicial concern.<sup>42</sup>

In 1975, the New Jersey Supreme Court noted that "[f]or constitutional purposes, rent control is indistinguishable from other types of governmental price regulation."<sup>43</sup> This court echoed Judge Friendly and concluded that the United States Supreme Court's general abandonment of the emergency requirement for price regulation also applies to rent control.<sup>44</sup> The Maryland Court of Appeals used the same reasoning to decide a rent control case one week later.<sup>45</sup> More recently, the California Supreme Court held that the constitutional standards applicable to "other consumer prices" also apply to the regulation of rents.<sup>46</sup> The court stated that if the operative provisions of legislation regulating prices is reasonably related to the accomplishment of a legitimate governmental objective, the legislation is within the state's police power.<sup>47</sup>

Drafters of rent control legislation should determine whether their jurisdiction still requires a housing emergency to justify regulation of rents. If the jurisdiction so requires, the legislation should include a declaration of the conditions constituting the emergency. However, the drafter should remember that a narrow construction of "emergency" may nevertheless lead to invalidation of the measure.<sup>48</sup> The drafter in a jurisdiction no longer requiring a housing emergency to sustain the legislation's constitutionality need not include a "boilerplate" declaration. However, inclusion of a detailed factual statement of the actual

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42. *Id.* at 567.

43. *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 555-56, 350 A.2d 1, 7 (1975).

44. *Id.* at 556-64, 350 A.2d at 8-12.

45. *See Westchester W. No. 2 Ltd. v. Montgomery County*, 276 Md. 448, 348 A.2d 856 (1975).

46. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159, 550 P.2d 1001, 1023, 130 Cal. Rptr. 465, 487 (1976).

47. *Id.* at 158, 550 P.2d at 1022, 130 Cal. Rptr. at 486.

48. *See, e.g., City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 804 (Fla. 1972). In this case, the court used the narrow definition of emergency set forth by the United States Supreme Court in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), stating that an increase in cost of living in itself does not constitute an emergency.

conditions in the community enhances the probability that a court would uphold the legislation. If the court were to defer to the legislative findings, the statement could demonstrate that the legislation is reasonably related to a legitimate governmental objective.<sup>49</sup>

### *Due Process—Non-Confiscatory Requirement*

Opponents of rent control legislation also attack it for failing to provide a fair return on investment to landlords. Opponents charge that the legislation constitutes a taking of property without due process of law, characterizing the rent control formula as arbitrary, unreasonable, or confiscatory.<sup>50</sup>

Rent control legislation may be subject to attack as confiscatory on its face. An ordinance may be "so restrictive as to facially preclude any possibility of a just and reasonable return."<sup>51</sup> A regulation is facially invalid when its terms do not permit administrators to avoid confiscatory results.<sup>52</sup> For example, in *City of Miami Beach v. Forte Towers, Inc.*,<sup>53</sup> the Supreme Court of Florida invalidated a rent control ordinance because of its administrative standards and guidelines. Four Justices found the guidelines so fixed and arbitrary that they prevented the administrator from allowing a fair rate of return.<sup>54</sup> The California Supreme Court has also made clear, in *Birkenfeld v. City of Berkeley*,<sup>55</sup> that an adjusting mechanism must accompany the imposition of rent ceilings of indefinite duration. A mechanism is sufficient only if it can provide adjustments in maximum rents without causing substantially greater delay than is practically necessary.<sup>56</sup> The court found a city charter amendment constitutionally deficient because it prescribed adjustment procedures that would make unreasonable delays inevitable.<sup>57</sup>

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49. See *Second Generation Rent Controls*, *supra* note 13, at 242. See also *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 160, 550 P.2d 1001, 1024, 130 Cal. Rptr. 465, 488 (1976).

50. *Second Generation Rent Control*, *supra* note 13, at 248.

51. *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 571, 350 A.2d 1, 16 (1975).

52. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 127, 165, 550 P.2d 1001, 1027, 130 Cal. Rptr. 465, 491 (1976).

53. 305 So. 2d 764 (Fla. 1974).

54. *Id.* at 768. A landlord could obtain an adjustment under this ordinance if the landlord's net annual return was less than six percent of the property's assessed valuation on the date base rents were set.

55. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

56. *Id.* at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 494.

57. *Id.* The rent control board lacked the power to order general rent adjustments or to consider a landlord's petition for an adjustment without a "full-blown" hearing. The board could not easily consolidate hearings or delegate the responsibility for holding hearings. A landlord's petition for a hearing could not be considered unless it included a certificate of housing code compliance. "[B]ecause of the



The just-and-reasonable-return requirement does not mandate the use of any particular mechanism of regulation; the means chosen simply must be neither arbitrary nor unreasonable.<sup>58</sup> A regulation which incidentally reduces property values is not necessarily invalid for this reason.<sup>59</sup> Furthermore, the permitted rate of return is evaluated on the basis of returns on investments in other enterprises with similar risks. It need not be as high as that prevailing in the business prior to regulation.<sup>60</sup> Finally, in at least one jurisdiction, the courts read into the rent control ordinance an implied assurance to landlords of a just and reasonable return.<sup>61</sup> This implied assurance protects the legislation from charges that it is facially confiscatory.

In order to survive a constitutional challenge, a rent control regulation must be nonconfiscatory as applied as well as nonconfiscatory on its face. In *Troy Hills Village v. Township Council*,<sup>62</sup> the New Jersey Supreme Court set forth guidelines in broad dicta for lower courts to follow in fair return cases. The first step is the calculation of the actual rate of return which the landlord will receive under the rent control ordinance. Second, the guidelines call for determining the rate of return below which a return would be confiscatory. This is the just and reasonable rate of return on a given rental unit.<sup>63</sup> If the actual rate of return falls below the just and reasonable rate of return, the ordinance is invalid as confisca-

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lack of these powers, once rents were rolled back case-by-case procedures would be incapable of adjusting inequitable rent ceilings except for 'a lucky few.' This administrative inflexibility, according to the court, made some confiscation inevitable." Case Note, *Birkenfeld v. City of Berkeley*, 65 CALIF. L. REV. 304, 316 (1977).

58. *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 569, 350 A.2d 1, 15 (1975).

59. *Id.*

60. *Id.* at 570, 350 A.2d at 15. The New Jersey Supreme Court further stated that rent levels are not objectionable merely because they fix returns at a lower rate for inefficient operators, do not reward persons who have paid excessive or inflated purchase prices for their property, or otherwise work hardships on landlords in atypical situations. *Id.*

61. See, e.g., *id.* at 572, 350 A.2d at 16. See also *Brunetti v. Borough of New Milford*, 68 N.J. 576, 350 A.2d 19 (1975). In *Brunetti*, the New Jersey Supreme Court held New Milford's rent control ordinance not confiscatory on its face. The ordinance permitted annual, although limited, increases in rental charges and unlimited hardship rent increases when a landlord could not realize a reasonable return on his investment. *Id.* at 592, 350 A.2d at 27.

62. 68 N.J. 604, 350 A.2d 34 (1975).

63. *Id.* at 622-30, 350 A.2d at 44-48. The court declared that a just and reasonable rate of return must be high enough "to encourage good management . . . , to furnish a reward for efficiency, to discourage the flight of capital from the rental housing market, and to enable operators to maintain and support their credit." *Id.* at 629, 350 A.2d at 47.

tory.<sup>64</sup> The court's only function is determining the lowest constitutionally permissible rate.<sup>65</sup> The *Troy Hills Village* guidelines have been criticized as vague standards.<sup>66</sup>

Rent control legislation should not compel efficient landlords to accept less than a just and reasonable rate of return.<sup>67</sup> Drafters should guard against provisions or procedures that render the legislation facially confiscatory. In addition, drafters should continuously review available statistical data in order to design successfully an ordinance which is nonconfiscatory as applied.

### *State Versus Municipal Exercise of Police Power to Regulate Rents*

Tenant organizations should determine whether their cities or counties have the power to enact rent controls or whether state action will be necessary. State law concerning the relationship between a state and its municipalities determines the extent of a given municipality's authority.<sup>68</sup> In some states, municipalities have no power to enact a rent control law unless state legislation authorizes the exercise of such power by a municipality.<sup>69</sup> In other states, while rent control is not a municipal affair, rent control legislation is nevertheless effective to the extent that it does not conflict with general law.<sup>70</sup> In still other states, as an exercise of their police power, municipalities may control rents and evictions to meet an emergency housing shortage affecting the public health, safety, and welfare.<sup>71</sup>

Once a municipality is found to have the power to enact rent controls, the tenant organization's second step is to determine

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64. *Id.* at 622, 350 A.2d at 43.

65. *Id.*

66. *See, e.g., Rent Control in the 1970's, supra* note 2, at 676-78. Determining value is a critical step in calculating actual rate of return. However, the *Troy Hills Village* court did not decide how to determine the value of rental property. Instead, the court discussed available techniques and highlighted the weak points of each method. Also, the court demanded that "aberrant forces" (in the *Troy Hills Village* situation a housing shortage) be discounted in determining value. However, the court did not offer guidelines as to how this would be accomplished. *See Troy Hills Village v. Township Council*, 68 N.J. 604, 623-26, 350 A.2d 34, 44-46 (1975).

67. *Troy Hills Village v. Township Council*, 68 N.J. 604, 630, 350 A.2d 34, 47 (1975).

68. *See Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140-41, 550 P.2d 1001, 1009-10, 130 Cal. Rptr. 465, 473-74 (1976).

69. *See, e.g., City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 804 (Fla. 1972).

70. *See, e.g., Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 141, 550 P.2d 1001, 1010, 130 Cal. Rptr. 465, 474 (1976).

71. *See, e.g., Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 533-34, 303 A.2d 298, 303 (1973); *Warren v. City of Philadelphia*, 382 Pa. 380, 383-84, 115 A.2d 218, 220 (1955).

whether the state has preempted the area.<sup>72</sup> The initial question in preemption analysis is whether the state has acted in the field in which the ordinance operates.<sup>73</sup> If it has, certain other questions must be answered:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or . . . permit what the Legislature has forbidden)?
2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity . . . ?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?<sup>74</sup>

When an ordinance deals with subject matter that the state has preempted, the ordinance is void.<sup>75</sup> Preemption often invalidates local rent control provisions dealing with eviction when the state provides landlords with a summary procedure for exercising the right of repossession against tenants.<sup>76</sup> If an ordinance attempts to change these procedures in connection with rent-controlled units, this section of the ordinance invalidly conflicts with state law.<sup>77</sup> However, even where certain portions of an ordinance are invalid, the remaining sections retain their validity unless the voided sections are essential to the purpose of rent regulation.<sup>78</sup>

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72. *Overlook Terrace Management Corp. v. Rent Control Bd.*, 71 N.J. 451, 461, 366 A.2d 321, 326 (1976). Federal preemption is also possible. The Department of Housing and Urban Development has recently promulgated a regulation which has resulted in preemption of some local rent control laws. A full discussion of the regulation is beyond the scope of this Comment. However, drafters of rent control measures should be aware of the regulation's effect. In brief, the regulation supersedes state and local rent control laws with respect to projects financially supported by mortgages insured or held by the Department of Housing and Urban Development. See 24 C.F.R. § 403 (1976). See generally Note, *Pre-Emption of Local Rent Control Laws by HUD Regulation*, 45 *FORDHAM L. REV.* 651 (1977).

73. *Overlook Terrace Management Corp. v. Rent Control Bd.*, 71 N.J. 451, 461, 366 A.2d 321, 326 (1976).

74. *Id.* at 461-62, 366 A.2d at 326.

75. *Brunetti v. Borough of New Milford*, 68 N.J. 576, 601, 350 A.2d 19, 32 (1975).

76. See, e.g., CAL. CIV. PROC. CODE §§ 1159-1179a (West Supp. 1977).

77. See, e.g., *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 153-54, 550 P.2d 1001, 1018, 130 Cal. Rptr. 465, 482 (1976); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 602-03, 350 A.2d 19, 33 (1975).

78. *Lifschitz v. City of Miami Beach*, 339 So. 2d 232, 235 (Fla. Dist. Ct. App. 1976). See also *Brunetti v. Borough of New Milford*, 68 N.J. 576, 600 n.23, 350 A.2d 19, 31 n.23 (1975) (the ordinance contained a severability or saving clause).

DRAFTING RENT CONTROL LEGISLATION—SPECIFIC  
CONTENTS AND PROBLEMS

*Exemptions*

Drafters of rent control measures should consider which units the legislation will cover and which will be exempt from regulation. For example, in attempting to avoid making the housing production field unattractive to investors, developers, or lending institutions, legislation might exclude “new housing”—either newly offered or newly constructed units—from control.<sup>79</sup>

Another exclusion method is by number of units. New Jersey ordinances often exempt rental units with four or fewer units from coverage.<sup>80</sup> A rent control measure could also exclude “luxury” housing.<sup>81</sup> However, an ordinance need not include a luxury-housing exemption; the mere fact that the more affluent tenant might not be affected to the same degree as the low-income tenant has been held insufficient to invalidate the legislation.<sup>82</sup>

Drafters making decisions concerning exemptions from rent control legislation should consult the housing characteristic elements of the most recent census. Drafters should keep in mind the number and the types of units they plan to exclude. They should consider the income level of the tenants in these units, and they should determine whether existing forms of control already regulate these units. Drafters should also consult economists and local planners to predetermine the direct effect of a given exclusion.<sup>83</sup>

*Setting Base Rents and Rollback Provisions*

Almost every rent control measure specifies a date which determines the base-period rent. Rent increases are later computed using this figure. Often, the legislation contains a rollback provision selecting a date prior to the enactment of rent controls to set initial rent levels.<sup>84</sup>

Rollback provisions are desirable for two reasons. First, the rent charged on a prior date theoretically approximates the rent that would be paid in an open market without the upward pres-

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79. *Second Generation Rent Controls*, *supra* note 13, at 242. See, e.g., *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 583, 350 A.2d 19, 22 (1975).

80. See *Rent Control in the 1970's*, *supra* note 2, at 660 n.187.

81. For example, Massachusetts' enabling act allowed municipalities to exclude up to 25% of their highest-rent units. MASS. GEN. LAWS ANN. ch. 40 app., § 1-3(b)(7) (West Supp. 1977) (expired 1976).

82. See *Muss v. City of Miami Beach*, 339 So. 2d 236 (Fla. Dist. Ct. App. 1976).

83. *Second Generation Rent Controls*, *supra* note 13, at 243.

84. *Id.*

asures leading to rent control.<sup>85</sup> Second, by setting the prior date early enough, the legislation can avoid incorporating landlords' anticipatory, last-minute increases and freezing them into controlled rental levels.<sup>86</sup> Landlords might challenge the use of the prior date as arbitrary and unreasonable. However, courts have upheld rent control legislation against such challenges, noting that the rent level in effect on the rollback date may have yielded an unreasonably high return at the time the landlord initially selected it.<sup>87</sup> Courts rarely strike down the rollback provision standing alone.<sup>88</sup>

However, rollback provisions coupled with cumbersome adjustment procedures may render rent control legislation confiscatory and unconstitutional. In *Birkenfeld*,<sup>89</sup> a city charter amendment called for an automatic, universal rollback with slow, case-by-case relief of any inequitable results.<sup>90</sup> The California Supreme Court held that these provisions would deprive landlords of due process of law if they were permitted to take effect.<sup>91</sup> Similarly, in *City of Miami Beach v. Forte Towers, Inc.*,<sup>92</sup> the Supreme Court of Florida struck down a rent control ordinance in part because of the rollback provision. The ordinance "froze" rents at an earlier date and set forth inflexible standards and guidelines for granting increases.<sup>93</sup> Costs had continually increased since the rollback date. This fact, coupled with the restrictions on the administrator's ability to allow a nonconfiscatory rate of return, led the court to invalidate the ordinance.<sup>94</sup>

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85. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 166, 550 P.2d 1001, 1027, 130 Cal. Rptr. 465, 491 (1976).

86. *Id.*; *Marshall House, Inc. v. Rent Control Bd.*, 358 Mass. 686, 701, 266 N.E.2d 876, 886 (1971).

87. *See, e.g., Hutton Park Gardens v. Town Council*, 68 N.J. 543, 574, 350 A.2d 1, 17 (1975).

88. Rollback provisions standing alone have weathered attack in several states. *E.g., Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976); *Marshall House, Inc. v. Rent Control Bd.*, 358 Mass. 686, 266 N.E.2d 876 (1971); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 350 A.2d 1 (1975).

89. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

90. *Id.* at 169-72, 550 P.2d at 1030-32, 130 Cal. Rptr. at 494-96. "The Board has no power to adjust rent ceilings on any one of these thousands of units until it has received a separate petition for that unit and considered the petition at an adjustment hearing." *Id.* at 170, 550 P.2d at 1030, 130 Cal. Rptr. at 494.

91. *Id.* at 173, 550 P.2d at 1033, 130 Cal. Rptr. at 497.

92. 305 So. 2d 764 (Fla. 1974).

93. *Id.* at 767. *See* note 54 *supra* for the formula set by the Miami Beach ordinance.

94. 305 So. 2d 764, 768 (Fla. 1974).

Not all rent control legislation contains rollback provisions; in some instances, base rents are those that were in effect on the day the measure was adopted.<sup>95</sup> If drafters decide to use a prior date to determine base rents, they should also include adjustment procedures which are sufficiently flexible to minimize confiscatory results.

### *Rent Adjusting Mechanisms for Subsequent Rent Adjustments*

Rent control legislation allows landlords restricted rent increases; it does not place an absolute freeze on rents. Several alternative methods for rent adjustment are return-on-investment formulas, percentage increase with allowable pass-throughs, evaluation of individual cases by rent control boards, and hardship rent adjustments.

#### Return-on-Investment Formulas

Rent control legislation may restrict the landlord's return on investment by using a formula. Under this method, the rent control board or administrator first determines fair profit levels for a base year.<sup>96</sup> The board then considers factors such as the following to determine whether a controlled unit yields a fair net operating income and whether to grant a rent increase:

- (1) [i]ncreases or decreases in property taxes;
- (2) unavoidable increases or any decreases in operating and maintenance expenses;
- (3) capital improvement of the housing unit as distinguished from ordinary repair, replacement and maintenance;
- (4) increases or decreases in living space, services, furniture, furnishings or equipment;
- (5) substantial deterioration of the housing units other than as a result of ordinary wear and tear; and
- (6) failure to perform ordinary repair, replacement and maintenance.<sup>97</sup>

This list of factors is not exhaustive; the rent control board or administrator may consider others.<sup>98</sup>

Commentators have suggested that the return-on-investment formula, which operates on a case-by-case basis, best applies to

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95. See, e.g., provisions of local rent control ordinances set forth in *Westchester W. No. 2 Ltd. v. Montgomery County*, 276 Md. 448, 449, 348 A.2d 856, 857 (1975) (ordinance enacted September 18, 1973, with effective date of October 1, 1973; base rents were rents charged for September, 1973); *Troy Hills Village v. Township Council*, 68 N.J. 604, 613 n.2, 350 A.2d 34, 38 n.2 (1975) (ordinance adopted in April, 1973; base rents were those in effect as of April, 1973).

96. *Second Generation Rent Controls*, *supra* note 13, at 243.

97. ME. REV. STAT. ANN. tit. 30, § 5375(2) (West Supp. 1973). The Berkeley charter amendment provided similar factors. Amendment to Berkeley City Charter, art. XVII, § 5, res. ch. 96, 1972 Cal. Stats. 3370, *reprinted in* *Birkenfeld v. City of Berkeley*, 17 Cal. 3d at 174-80, 550 P.2d at 1033-40, 130 Cal. Rptr. at 497-504.

98. See ME. REV. STAT. ANN. tit. 30, § 5375(2) (West Supp. 1973).

three specific situations. They have maintained that drafters should use the return-on-investment method when existing housing stock deteriorates significantly, when rents are excessive, or when rents are in great disparity. If a city with widely varying rents were to enact rent controls with adjustments based on an annual percentage, landlords who had kept their rents low would in effect be penalized. However, landlords who had been charging exorbitant rents would retain high rates of return and would obtain larger rent increases.<sup>99</sup> "The return on investment formula can equalize these rents by denying rent increases, decreasing excessive rents, or allowing moderate increases on existing low rents. In areas where rents are uniformly exorbitant a return on investment formula might allow a resetting of rents to reasonable levels."<sup>100</sup>

Percentage Increase—Based on the Consumer Price Index or on a Flat Percentage—with Allowable Pass-Throughs

A rent control system may tie the annual rental increase to the percentage increase in the Consumer Price Index (CPI) for the preceding year.<sup>101</sup> The percentage used to compute a rent increase may be 100% of the CPI's percentage increase, or it may be

99. *Second Generation Rent Controls*, *supra* note 13, at 244. For example, assume L<sup>1</sup> charges rent of \$100 per month which gives him a reasonable return on investment for a particular apartment. L<sup>2</sup> charges \$200 for similar premises and thus receives an exorbitant rate of return. The following year, rent of \$150 per month is necessary to provide a reasonable rate of return. If a rent control ordinance allows a 5% increase, L<sup>1</sup> can increase his rent to \$105 per month. However, L<sup>2</sup> can increase his rent to \$210 per month and can continue to receive an exorbitant monthly rent. The effect of a return-on-investment method is to penalize L<sup>1</sup>, who had attempted to treat tenants fairly. Because he charged a lower rent prior to the enactment of rent control, L<sup>1</sup> cannot realize a fair return on his investment.

100. *Id.*

101. The Consumer Price Index is a statistical measure of fluctuations in urban consumers' costs of living; it is widely used as a measure of the dollar's purchasing power. The United States Bureau of Labor Statistics computes the index by calculating percentage price changes of a sample "market basket" of goods and services in major expenditure groups such as food, housing, apparel, transportation, and health and recreation. It then weights the percentage price changes in accordance with the relative importance of each item. The index is the average of these weighted percentage price changes.

The Consumer Price Index was revised beginning in 1978. Among other changes, the comprehensive revision updates the sample of items priced and the weights assigned to the expenditure groups. The revision also provides an additional index representing nearly all consumers' experience as opposed to wage and clerical workers alone. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, *THE CONSUMER PRICE INDEX—REVISION—1978*, at 1 (1978).

only a fraction of that increase.<sup>102</sup> In the alternative, rent control legislation may regulate rent increases simply by setting a ceiling on the annual allowable percentage increase.<sup>103</sup>

Landlords compute each unit's increase by applying the allowable percentage, whether a fixed annual rate or a rate based upon the CPI, to existing rents. The New Jersey Supreme Court has sustained the limitation of these increases to a fraction of the CPI percentage increase.<sup>104</sup> The court emphasized that the landlords themselves had selected the base rents to which the percentage was applied. In some cases, allowing an increase equal to 100% of the CPI increase would perpetuate the recovery of exorbitant rents: "Therefore, at least in some instances, rent increase formulae which limit rent increases to an amount less than the percentage increase in the CPI may be not only rational but may be necessary if rent control is to protect tenants from unjust and exorbitant rents."<sup>105</sup>

In addition to permitting the allowable percentage increase, a rent control measure may allow landlords to apply for surcharges, labeled "pass-throughs," for tax increases<sup>106</sup> or for capital improvements.<sup>107</sup> Certain problems accompany the inclusion of pass-throughs in rent control measures. For tax pass-throughs, drafters should consider how to require apportionment of the taxes among the tenants: by rent paid, by square feet occupied, or by rooms rented. Another consideration is whether tenants

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102. See, e.g., *Troy Hills Village v. Township Council*, 68 N.J. 604, 613 n.2, 350 A.2d 34, 38 n.2 (1975) (maximum percentage increase of 60% times the weighted annual average by quarters of the CPI increase); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 584, 350 A.2d 19, 23 (1975) (limits allowable rent increases to 50% of the percentage increase in the CPI); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 552, 554-55, 350 A.2d 1, 6 (1975) (West Orange—100% of CPI increase; Wayne Township—50% of CPI increase).

103. See, e.g., *Westchester W. No. 2 Ltd. v. Montgomery County*, 276 Md. 448, 449, 348 A.2d 856, 857 (1975) (maximum of four percent of existing rent).

104. *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 574-75, 350 A.2d 1, 18 (1975).

105. *Id.*

106. See, e.g., *Troy Hills Village v. Township Council*, 68 N.J. 604, 614, 350 A.2d 34, 39 (1975) (based on ratio of the square footage occupied by the tenant to the total square footage of the building); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 583, 350 A.2d 19, 22 (1975) (based on percentage of total rooms in the building occupied by the tenant); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 552-54, 350 A.2d 1, 15-16 (1975) (West Orange—based on percentage of square footage of building occupied by tenant to a maximum of five percent of existing rent; Wayne Township—based on percentage of rooms occupied).

107. See, e.g., *Troy Hills Village v. Township Council*, 68 N.J. 604, 614, 350 A.2d 34, 39 (1975); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 53-54, 350 A.2d 1, 6 (1975). But cf. *Brunetti v. Borough of New Milford*, 68 N.J. 576, 350 A.2d 19 (1975) (ordinance did not allow pass-through of capital improvement costs; New Jersey Supreme Court could not say a priori that the ordinance would necessarily leave landlords with inadequate revenue for normal maintenance).



should benefit from landlords' successful tax appeals or tax reduction.<sup>108</sup> One local rent control ordinance has met this problem by requiring landlords to disburse among their tenants fifty percent of any reduction. Tenants receive the disbursement in proportion to the amounts for which they are responsible under the tax surcharge formula.<sup>109</sup>

Capital improvement pass-throughs can also present problems. Landlords might shift to tenants the cost of repairing code violations which landlords are obliged to correct. In addition, landlords might use capital improvement pass-throughs to circumvent tenant protections against retaliatory rent increases. Legislation may attempt to retain tenant protection by making the landlord's good faith maintenance of the premises a condition precedent to obtaining a pass-through.<sup>110</sup> Some rent control measures allow only "major" capital improvements to be charged the tenants.<sup>111</sup>

Rent adjustment provisions may place an upper limit on the total annual rent increase. A separate ceiling may apply to each type of surcharge, while another ceiling may apply to the total of these surcharges.<sup>112</sup> Certain surcharges may not be subject to any ceiling.<sup>113</sup> Finally, the legislation may contain a single upper limit above which the total of the annual percentage increases plus surcharges may not go.<sup>114</sup>

Commentators have advocated the use of the annual percentage increase when rents are equalized and are not excessive and when housing stock is in relatively good condition. By setting relatively uniform limits on rent increases, this method can help guard against future rent-gouging and inflation. The commentators point out that if tenants receive adequate information con-

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108. *Second Generation Rent Control*, *supra* note 13, at 244. See generally cases cited note 106 *supra*.

109. *Brunetti v. Borough of New Milford*, 68 N.J. 576, 583, 350 A.2d 19, 22 (1975). Thus, a tenant responsible for 10% of the landlord's tax increase would receive 10% of any amount the landlord disbursed pursuant to a tax reduction.

110. *Second Generation Rent Controls*, *supra* note 13, at 244.

111. See, e.g., *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 553-54, 350 A.2d 1, 6 (1975).

112. See, e.g., *id.* Under the West Orange ordinance, total tax surcharges could not exceed five percent of existing rent. Surcharges for major capital improvements could not exceed 10% of existing rent. The ordinance placed a 10% rent ceiling on the aggregate of all additional increases and surcharges.

113. See, e.g., *Brunetti v. Borough of New Milford*, 68 N.J. 576, 590 n.16, 350 A.2d 19, 26 n.16 (1975) (no ceiling on hardship rent increases).

114. See *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 553 n.2, 350 A.2d 1, 6 n.2 (1975).

cerning allowable rent increases, the percentage system can become self-enforcing.<sup>115</sup>

### Evaluation of Individual Cases by Rent Control Boards

Connecticut authorizes its municipal legislative bodies to create fair rent commissions to control and eliminate excessive rental charges.<sup>116</sup> A fair rent commission analyzes rents on a case-by-case basis. The commission takes into account factors such as rents charged for similar accommodations, sanitary conditions, services, and repairs necessary.<sup>117</sup> "If a commission determines, after a hearing, that the rent charges for any housing accommodation are so excessive . . . as to be harsh and unconscionable, it may order a reduction in rent to such an amount as it determines to be fair and equitable."<sup>118</sup>

### Hardship Rent Adjustments

Rent control legislation may make hardship rent adjustments possible in addition to the annual rental increase. A landlord may apply for such an adjustment when he or she cannot meet mortgage or maintenance costs.<sup>119</sup> One New Jersey local ordinance also permitted a hardship rent increase if the landlord proved he or she could not realize a reasonable return on the investment in the property.<sup>120</sup> The rent control measure may subject the hardship rent adjustment to the same upper limits as other rental increases and surcharges.<sup>121</sup>

### Eviction Controls

A landlord holds a dominant bargaining position during periods of rising prices when housing is in short supply.<sup>122</sup> Rent control can be circumvented by landlords who threaten to evict tenants who refuse to pay rent increases. Rent control measures therefore often limit the permissible grounds for eviction and set proce-

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115. *Second Generation Rent Controls*, *supra* note 13, at 244.

116. CONN. GEN. STAT. ANN. § 7-148b (West 1972).

117. *Id.* § 7-148c.

118. *Id.* § 7-148d.

119. *See, e.g.*, *Troy Hills Village v. Township Council*, 68 N.J. 604, 614, 350 A.2d 34, 39 (1975); *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 553-54, 350 A.2d 1, 6 (1975).

120. *See Brunetti v. Borough of New Milford*, 68 N.J. 576, 583, 350 A.2d 19, 23 (1975). The New Jersey Supreme Court construed the clause as the equivalent of a requirement that landlords must be permitted a fair return on investment. Thus, the ordinance was not facially confiscatory.

121. *See, e.g.*, *Hutton Park Gardens v. Town Council*, 68 N.J. 543, 553-54, 350 A.2d 1, 6 (1975).

122. Case Note, *Birkenfeld v. City of Berkeley*, 65 CALIF. L. REV. 304, 309 (1977).

dures for local enforcement.<sup>123</sup>

The major hazard in including a local eviction control scheme is the possibility that a state statute may preempt the eviction field. Most courts hold that state unlawful detainer statutes preempt local eviction controls, rendering them void.<sup>124</sup> Whether the remainder of the rent control law remains valid depends upon whether the voided provisions are severable.<sup>125</sup>

The California Supreme Court adopted the minority view in its opinion in *Birkenfeld*.<sup>126</sup> The court distinguished the statutory procedures for unlawful detainer proceedings<sup>127</sup> from the substantive grounds for eviction.<sup>128</sup> The court held that local rent control legislation can validly limit the substantive grounds for eviction in order to enforce rent ceilings.<sup>129</sup> The procedural purpose of the state unlawful detainer remedy does not preclude cities from imposing such controls. The court concluded that a tenant can assert the provisions limiting the grounds for eviction as a substantive defense in unlawful detainer proceedings.<sup>130</sup>

In 1974, New Jersey adopted statewide limitations on the removal of residential tenants.<sup>131</sup> This eviction-for-cause law enumerated the permissible grounds for eviction. The New Jersey Supreme Court since has held that the state thereby preempted the subject of substantive grounds for eviction. Consequently,

123. *Id.* at 308.

124. *E.g.*, *Burton v. City of Hartford*, 144 Conn. 80, 127 A.2d 251 (1956); *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972); *Huebeck v. City of Baltimore*, 205 Md. 203, 107 A.2d 99 (1954); *F.T.B. Corp. v. Goodman*, 300 N.Y. 140, 89 N.E.2d 865 (1949).

125. See notes 75-78 and accompanying text *supra*.

126. 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

127. CAL. CIV. PROC. CODE §§ 1159-1179a (West Supp. 1977).

128. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 149, 550 P.2d 1001, 1015-16, 130 Cal. Rptr. 465, 479-80 (1976).

129. *Id.* at 149, 550 P.2d at 1016, 130 Cal. Rptr. at 480. The amendment permitted the following grounds for eviction: tenant's failure to pay rent, other breach of duty to the landlord or misconduct, landlord's good faith intention to remove the unit from the housing market for certain permissible purposes, and tenant's refusal to execute a written renewal or extension of a lease which had expired. Amendment to Berkeley City Charter, art. XVII, § 7(a)(1), res. ch. 96, 1972 Cal. Stats. 3370, reprinted in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d at 174-80, 550 P.2d at 1033-40, 130 Cal. Rptr. at 497-504.

130. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 149, 550 P.2d 1001, 1015-16, 130 Cal. Rptr. 465, 479-80 (1976). For a discussion of the implications of this decision in California, see Case Note, *Birkenfeld v. City of Berkeley*, 65 CALIF. L. REV. 304 (1977).

131. Act of June 25, 1974, ch. 49, 1974 N.J. Laws 119 (codified at N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1977)).

provisions in municipal rent control ordinances attempting to limit further the permissible grounds for eviction are invalid.<sup>132</sup>

Drafters of rent control measures in states not specifying grounds for eviction may wish to include eviction-for-cause provisions. Drafters should remember, however, that a majority of courts find that state law preempts the entire field of eviction, substantive as well as procedural. Nevertheless, in a minority jurisdiction, the inclusion of an eviction-for-cause provision in rent control legislation gives tenants extensive protection against rent increases and evictions.<sup>133</sup>

### *Other Provisions*

#### **Administration, Funding, and Enforcement**

State enabling legislation can grant wide discretion to the rent control board or administrator charged with interpreting and enforcing rent control measures.<sup>134</sup> Rent control legislation should therefore address several additional factors. The legislation should prescribe the method of funding the board or administrator, its staff, and the hearing and enforcement mechanisms.<sup>135</sup> To promote smooth implementation, the legislation should provide some "lead time" between the date of enactment and the effective date. In this manner, election or appointment of the board or administrator and adoption of necessary rules and regulations can occur before the controls take effect. The legislation should also set standards for the election or appointment of the board or administrator.<sup>136</sup>

Rent control legislation should contain penalties for willful violation of the law.<sup>137</sup> The legislation can set forth criminal penalties of fine or imprisonment. The severity of the punishment could increase if a prior offender continues to violate the rent control law. The legislation can also provide tenants with civil remedies in the nature of damages or injunctive relief. If the legislation gives the rent control board or administrator standing to

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132. *Brunetti v. Borough of New Milford*, 68 N.J. 576, 603, 350 A.2d 19, 33 (1975).

133. *Second Generation Rent Controls*, *supra* note 13, at 245.

134. However, excessive delegation of authority can be invalid. *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974).

135. *Second Generation Rent Controls*, *supra* note 13, at 245. Possible methods of funding include state and local allocation of funds, charges for registration of controlled units, and charges for hearing fees.

136. *Id.* If the board or administrator is appointed, legislation should specify who bears the responsibility for appointment and what the standards of appointment are. For example, legislation might require that landlords and tenants have equal representation on the board. *See id.*, at 245 n.78.

137. C. ASHMUN & R. FRANKEN, *RENT CONTROL: AN INTERIM REPORT TO THE ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT* 27 (1975).

pursue these remedies in lieu of the injured tenant, the legislation can be enforced with even greater diligence. Strong enforcement provisions will help the board or administrator effectively implement rent control legislation.

Rent control measures should provide for notice and fair hearings for both landlords and tenants in compliance with minimum standards of due process.<sup>138</sup> Objective standards and guidelines should appear in the legislation or should be readily inferable from its language to avoid unlawful delegation of legislative authority.<sup>139</sup> Drafters of rent controls should exercise care in designing such standards to avoid implementing standards so restrictive or so rigid that they render the legislation facially confiscatory.

### Termination Date

Courts in many jurisdictions continue to require the existence of an emergency to justify rent controls. Because no emergency is presumed to continue indefinitely, most rent control legislation contains a specific expiration date, usually three to five years from its effective date.<sup>140</sup> Drafters may wish to include a provision for renewal as well.

### Devices for Preventing Housing Deterioration

Tenants in controlled rental units may be concerned that landlords will decrease services or maintenance in retaliation to rent control. As a protective measure, legislation could grant the rent control board or administrator the power to decrease a landlord's rental charges if services or maintenance decline.<sup>141</sup> Alternatively, the legislation might require landlords to maintain certain minimum service standards.<sup>142</sup> Landlords would be required to petition the rent control board or administrator regarding any

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138. *Second Generation Rent Controls*, *supra* note 13, at 246.

139. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 805 (Fla. 1972). A municipal legislative body may authorize administrative officers to prescribe rules and regulations that implement a policy declared by the legislative body. However, a municipal legislative body is constitutionally prohibited from delegating the formulation of legislative policy. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 167, 550 P.2d 1001, 1028, 130 Cal. Rptr. 465, 492 (1976).

140. C. ASHMUN & R. FRANKEN, *RENT CONTROL: AN INTERIM REPORT TO THE ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT* 15 (1975).

141. *See, e.g., Overlook Terrace Management Corp. v. Rent Control Bd.*, 71 N.J. 451, 457, 366 A.2d 321, 324 (1976).

142. *See, e.g., Lifschitz v. City of Miami Beach*, 339 So. 2d 232, 236 (Fla. Dist. Ct. App. 1976).

proposed reductions in services.<sup>143</sup> Such legislation could prevent landlords from reducing services provided as of a set date without a valid reason.

#### SAMPLE RENT CONTROL LEGISLATION

The following sample rent control ordinance illustrates the general structure of rent control legislation and incorporates many of the specific areas discussed in detail above.

#### Town of X Rent Control Ordinance<sup>144</sup> Preamble

The Town of X faces a serious housing problem.<sup>145</sup> The overall vacancy rate in the Town of X is less than five percent. Rents are continually increasing, and the condition of existing housing stock is steadily declining. The purpose of this ordinance is to alleviate this housing problem and to promote the health, safety, and welfare of the citizens of the Town of X.

#### I. Rent Control Board<sup>146</sup>

The Town of X shall establish a Rent Control Board consisting of five Commissioners. The Mayor of the Town of X shall appoint the Commissioners within sixty days of the date of this ordinance. Two Commissioners shall be members of the Town of X Tenant Organization and two Commissioners shall be landlords in the Town of X. The fifth Commissioner shall be a residential homeowner in the Town of X who is not a landlord.

The Commissioners shall serve an initial term of two years and, if reappointed, may serve a maximum of one additional two-year term. Each Commissioner shall receive twenty-five dollars for each meeting attended. However, a Commissioner's compensation shall not exceed \$1200 in any calendar year.

The Rent Control Board is empowered to roll back rents to a base rent established in Section III and to adjust rents as pro-

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143. *Id.*

144. The author used Amendment to Berkeley City Charter, art. XVII, res. ch. 96, 1972 Cal. Stats. 3370, reprinted in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d at 174-80, 550 P.2d at 1033-40, 130 Cal. Rptr. at 497-504, and Act of Aug. 31, 1970, ch. 842, §§ 1-14 (codified at MASS. GEN. LAWS ANN. ch. 40 app., §§ 1-1 to -14 (West Supp. 1977)) (expired 1976) as guidelines in constructing this sample ordinance. Readers are forewarned that actual legislation must contain more specific information, particularly concerning procedures required, hearings available, and funding mechanisms.

145. See text accompanying notes 24-49 *supra*.

146. See notes 134-36 and accompanying text *supra*.

vided in Section IV. The Board shall promulgate such rules and regulations as will further the purposes of this ordinance and shall appoint such staff as might be necessary to perform the Board's functions.

## II. Exemptions<sup>147</sup>

All rental units in the Town of X shall be subject to the controls established by this ordinance except:

- (a) owner-occupied rental units with fewer than four units;
- (b) rental units in hotels and motels which are rented primarily to transient guests; and
- (c) rental units owned, operated, or subsidized by a governmental agency.

## III. Base Rent<sup>148</sup>

The base rent shall be the rent in effect 180 days prior to the date of passage of this ordinance. In the case of newly constructed units completed after the rollback date, the base rent shall be the initial rent charged. The base rent shall take effect ninety days after the appointment of the Rent Control Board.

## IV. Rent Adjustments<sup>149</sup>

At the expiration or termination of a lease, the landlord of a controlled unit may increase the rent subject to the following limitations:

- (a) Rent increases may not exceed fifty percent of the difference between the Consumer Price Index 120 days prior to the commencement of the lease and the Consumer Price Index 120 days prior to the expiration or the termination of the lease.
- (b) Landlords may surcharge tenants for a portion of any property tax increase. Landlords shall apportion such surcharges according to the percentage of the square footage of the building

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147. See notes 79-83 and accompanying text *supra*.

148. See notes 84-95 and accompanying text *supra*.

149. See notes 96-121 and accompanying text *supra*.

occupied by each tenant. A tax surcharge increase may not exceed five percent of a tenant's existing rent.

- (c) A landlord may apply to the Rent Control Board for a rent surcharge of up to ten percent of the existing rent:
  - (1) when a landlord has made major capital improvements or increases in service; or
  - (2) if a landlord cannot meet mortgage obligations or maintenance costs.

#### V. Non-waiverability

Tenants may not waive the provisions of this ordinance. Any agreement purporting to constitute such a waiver shall be void.

#### VI. Judicial Review

A landlord or tenant aggrieved by any action, regulation, or decision of the Rent Control Board may appeal to the appropriate court within the jurisdiction.

#### VII. Sanctions

A tenant paying rent in excess of the maximum lawful rent may recover from the landlord three times the amount of the excess or one hundred dollars, whichever is greater. In addition, the tenant may recover reasonable attorneys' fees and costs as determined by the court.<sup>150</sup>

A tenant or class of tenants receiving substantially lower standards of service, maintenance, or equipment than their landlord provided prior to the enactment of this ordinance may apply to the Rent Control Board for a rental decrease.<sup>151</sup> The Board shall adjust the rent to the reasonable rental value until the landlord proves that he or she has corrected the deficiency.

The Rent Control Board, tenants, and landlords of controlled units may seek to restrain by injunction any violation of this ordinance or of the Board's rules, regulations, and decisions.

#### VIII. Severability

The provisions of this ordinance are severable. Should a court hold any provision of this ordinance invalid, such invalidity shall not affect other independent provisions of this ordinance.

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150. See text accompanying note 137 *supra*.

151. See notes 141-43 and accompanying text *supra*.



#### IX. Effective Date: Termination Date

This ordinance shall take effect ninety days from the date of enactment. This ordinance shall remain in full force and effect for two years beginning with the effective date. The Town Council may renew this ordinance for additional one-year periods if renewal is deemed necessary in light of housing conditions existing at the termination date.

#### CONCLUSION

Rent control measures may provide tenants with relief from the pressures of rising rents in periods when alternative housing is scarce. Opponents of rent control may stand in the way of such relief, however, by challenging the legislation in the courts or by finding a means of circumventing the law. Because a court may find a challenged rent control law constitutionally deficient in various ways, drafters must exercise great care in designing the legislation. In addition to withstanding constitutional challenges, effective rent control should also meet landlords' retaliatory reactions. The guidelines in this Comment attempt to present methods of achieving both objectives.

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